SUPREME COURT, U.S.
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No. 02-501

IN THE

Supreme Court of the United States

MARY LAMB-BOWMAN,

Petitioner,

v.

DELAWARE STATE UNIVERSITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE CASE

A. Counter-Statement Of The Nature And Stage Of The Proceedings

Petitioner Mary Lamb-Bowman (hereinafter "Petitioner") filed a Complaint in the United States District Court for the District of Delaware on November 24, 1998, against Respondent Delaware State University (hereinafter "Respondent") and individual Defendants Dr. William B. DeLauder, John C. Martin and William Collick, asserting various claims under federal and state law in connection with the non-renewal of her employment contract by Respondent. Specifically, Petitioner alleged violations of 42 U.S.C. § 1983, Title VII (42 U.S.C. § 2000e, *et seq.*), and Title IX (20 U.S.C. § 1681), and Petitioner alleged that Respondent's actions constituted wrongful discharge in violation of public policy.

On May 28, 1999, Respondent and the individual Defendants filed a motion for summary judgment on the basis that Petitioner's claims were time-barred. On December 10, 1999, the Court denied summary judgment on this basis with respect to Petitioner's Title VII claims, but granted summary judgment with regard to all of Petitioner's other claims, including her claims under Title IX.[1]

On April 20, 2000, Respondent filed a motion seeking summary judgment on all of Petitioner's remaining claims, namely, her Title VII sex discrimination claim and her Title VII

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1. It is Respondent's position that, with this decision, the Court effectively disposed of all claims against the individual Defendants, since individual employees may not be held liable under Title VII. *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061, 1077 (3d Cir. 1996), *cert denied*, 521 U.S. 1129 (1997).

retaliation claim.[2] On March 27, 2001, the District Court granted Respondent's motion, thus entering summary judgment in favor of Respondent on all of Petitioner's remaining claims. On June 28, 2002, the United States Court of Appeals for the Third Circuit affirmed.

B. Counter-Statement Of Facts

Petitioner claims in her Petition that Respondent "maintained a continuing practice, policy and custom of unlawfully discriminating against the **women** employees and **women** athletes in the Athletics Department at DSU," and that Respondent "intentionally maintained an environment that was intentionally discriminatory toward **women** coaches and **women** athletes." Pet. at 6, 7 (emphasis supplied). However, this is contrary to what Petitioner stated during discovery.

Petitioner stated in her deposition that **all** persons associated with women's athletics at Delaware State University, whether male or female, **including male coaches of women's athletic teams**, were discriminated against because they were associated with women's athletics. Petitioner further stated in her deposition that she suffered discrimination because she complained about inequitable treatment of her athletic program and the women's athletic programs in general. Petitioner also testified that discrimination against her athletic program constituted discrimination against her because "[t]he program is me." Finally, Petitioner testified that a document entitled "Comparison Table," comparing alleged disparities between

2. Thus, Petitioner's statement to the contrary in her Petition, *i.e.*, that Respondent sought summary judgment only on Petitioner's retaliation claim, is incorrect.

the women's basketball program and the men's basketball program at Delaware State University, supported her claim that she had been discriminated against because of her sex.

Petitioner was replaced as head women's basketball coach by another woman, Jackie Devane.

REASONS FOR DENYING THE PETITION

I. Neither The Record Nor The Decision Below Raise The Question Presented By The Petition.

According to Petitioner, the question presented by the petition is whether an employee whose discrimination claims are relevant and actionable under Title IX, but who has also met the requirements of Title VII, may proceed exclusively under Title VII. However, as the court below found, Petitioner has not met the requirements of Title VII, because she has failed to present a prima facie case of either sex discrimination or retaliation under Title VII. Thus, Petitioner's claims are **not** actionable under both Title VII and Title IX. Rather, they are actionable, if at all, only under Title IX.

Title VII, in pertinent part, prohibits, as an unlawful employment practice, discrimination against an individual "with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . sex . . ." 42 U.S.C. § 2000e-2(a)(1). As Petitioner asserted in discovery, however, she is claiming that Respondent discriminated against her because of her association with women's athletics, not because of her sex. As the record further demonstrates, Petitioner is claiming that she suffered retaliation not because she complained about discrimination

against female employees, but because she complained about discrimination against women's athletic programs — discrimination that, according to Petitioner, affected male employees (*i.e.*, male coaches of women's athletic teams) just as it did female employees.

It is undisputed that Petitioner's Title IX claims were dismissed by the District Court in December 1999 as untimely filed. [3] Thus, the only issue before the Court below is whether Petitioner has stated a prima facie claim under Title VII — *i.e.*, either a sex discrimination claim or a Title VII retaliation claim. Petitioner has not done so because the record shows that she is claiming discrimination and retaliation not because of her sex, but because of her association with women's athletic programs.

II. The Decision Below Does Not Conflict With Decisions Of Other Courts Of Appeals.

Both the District Court and the Court of Appeals below held that Petitioner had not made out a prima facie claim under Title VII because her claims of discrimination were based upon her association with women's athletic programs, not upon her sex. Petitioner has failed to cite any decision of a court of appeals, or indeed any authority, holding that such a claim is actionable under Title VII. Thus, the existence of circuit "splits" on such issues as whether a private right of action exists for money damages for gender-based employment discrimination under Title IX, *see, e.g.*, *Lakoski v. James*, 66 F.3d 751 (5th Cir. 1995), *cert. denied*, 519 U.S. 947 (1996) (there is no private cause of action for employment discrimination under Title IX) *and Preston v.*

3. Petitioner has never appealed the District Court's grant of summary judgment on her Title IX claims.

Commonwealth of Virginia ex rel. New River Community College, 31 F.3d 203, 205-06 (4th Cir. 1994) (recognizing private right of action under Title IX for employment discrimination), or whether a private right of action exists for retaliation under Title IX, *see, e.g.*, *Lowrey v. Texas A&M University System*, 117 F.3d 242, 249 (5th Cir. 1997) (Title IX provides private right of action for retaliation) *and Jackson v. Birmingham Board of Education*, 2002 U.S. App. LEXIS 22001 (11th Cir.) (Title IX does not provide private action for retaliation), are irrelevant to this case and to the decision of the court below.[4]

Neither the Court of Appeals nor the District Court in this case held, as claimed by Petitioner, that the rights and remedies under Title VII and Title IX are mutually exclusive. Rather, both courts held only that certain claims that may be actionable under Title IX — *i.e.*, claims that an employee has suffered discrimination because of her association with women's athletics or because of her complaints about the treatment of women's athletic programs — are not actionable under Title VII, because Title VII prohibits discrimination based upon sex and upon complaints of sex discrimination in employment, not discrimination and retaliation based upon association with women's athletic programs.

In summary, Petitioner's claim that the decision of the court below is in conflict with decisions of other courts of appeals is erroneous and is an attempt by Petitioner to gain access to this Court when there is no warrant for her to do so under the rules and precedents of this Court.

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4. Indeed, the United States Court of Appeals for the Third Circuit has not ruled on either of the above issues, and the decision of the court below did not take a position on either issue.

III. The Court Below Properly Determined That Petitioner Did Not Make Out A Prima Facie Case Of Sex Discrimination Under Title VII.

As the court below properly stated, in order to state a prima facie case of sex discrimination under Title VII, a Plaintiff must show (1) that she is a member of a protected class; (2) that she suffered an adverse employment action; and (3) that this action occurred under circumstances giving rise to an inference of unlawful discrimination, such as might occur when a similarly situated individual not of the protected class is treated differently. Pet., App. 28 (citing *Boykins v. Lucent Technologies, Inc.*, 78 F. Supp. 2d 402, 409 (E.D. Pa. 2000), *aff'd*, 2002 U.S. App. LEXIS 4883 (citing *Jones v. School Dist. of Philadelphia*, 198 F.3d 403, 410 (3d Cir. 1999))). The court below correctly found that, because Petitioner's claims of sex discrimination "were based, by her own account, on her opposition to DSU's funding and resource disparities between the women's and men's athletic programs and to DSU's discrimination toward all persons associated with women's athletics," she could not satisfy the third prong of a prima facie claim. Pet., App. 29.

Petitioner claims in her Petition that she "has proved that the manner in which she and other women employees were terminated differed discriminatorily from the manner in which DSU treated and terminated its men employees in the athletic department." Pet. at 18. This is not, however, what Petitioner herself declared in discovery. Specifically, Petitioner stated in her deposition that the discrimination that she allegedly experienced was directed at her not because she was a woman, but because she was associated with women's athletic programs.

As noted *supra*, Petitioner stated that not only were the women in the Athletic Department of Respondent discriminated against, but all persons associated with women's athletics, including male coaches of women's sports, were discriminated against because of their association with women's athletics. Thus, as the Court below properly held, Petitioner failed to satisfy the third prong of a prima facie Title VII claim because she failed to show the existence of circumstances that would give rise to an inference that she was discriminated against because of **her** gender rather than the gender of the student athletes that she coached.

IV. The Court Below Properly Determined That Petitioner Did Not Make Out A Prima Facie Case Of Retaliation Under Title VII.

The court below also stated the proper standard for stating a prima facie claim of retaliation under Title VII: a Plaintiff must show (1) that she engaged in a protected activity; (2) that she suffered an adverse employment action; and (3) that there is a causal link between the protected activity and the adverse action. Pet., App. 30 (citing *Kachmar v. Sunguard Data Sys., Inc.*, 109 F.3d 173, 177 (3d Cir. 1999). The problem for Petitioner, as both of the courts below recognized, is that she could not and cannot satisfy the first prong of this test because her purported protected activity is **not** protected under Title VII.

Title VII prohibits discrimination by an employer against an employee

> because he has opposed any practice made an unlawful employment practice by this subchapter,

> or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a). Using the language of the statute, discrimination against an employee because of his or her sex has been "made an unlawful employment practice" by Title VII. However, neither discrimination in general against women's athletic programs, nor discrimination against an employee because of his or her association with women's athletic programs, has been "made an unlawful employment practice" by Title VII. The latter, however, are by Petitioner's own account what she complained of, and the source of retaliation against her.

Petitioner claims in her Petition that she "engaged in protected activities when she opposed the discriminatory work environment created by DSU for her as an employee and for the other women in the athletic department." Pet. at 22. However, it is evident from Petitioner's own testimony at her deposition that the discrimination that she observed and complained about was not discrimination against women employees in the Athletic Department because of their gender, but discrimination against students and employees, male and female, in the Athletic Department because of their association with women's athletic teams. According to Petitioner, male coaches of women's teams at Delaware State University suffered discrimination along with female coaches of such teams. Moreover, by Petitioner's own account, not all women employees in the University's Athletic Department suffered discrimination. Specifically, Petitioner testified that Helen Scott, the Athletic Department secretary, was one of the individuals who discriminated against Petitioner.

Petitioner made clear on the record that the alleged "protected activity" for which she was terminated was her complaining about disparities between the men's and women's athletic programs, and particularly the men's and women's basketball programs at the University. According to Petitioner, Athletic Director John Martin changed his treatment of Petitioner and improperly lowered her evaluation after she complained about the inadequacy of scholarships and funding provided the women's basketball program. Thus, by her own account, Petitioner suffered retaliation not because she complained about discrimination against female employees on the basis of their sex (which is prohibited by Title VII), but because she complained about discrimination against all persons associated with women's athletics at the University, including male coaches (which is not prohibited by Title VII). It was for this reason that the District Court and the Court of Appeals held that Petitioner's claims should be dismissed, *i.e.*, because her alleged "protected activity" is not "protected" by Title VII.

Petitioner has attempted to muddy the record in this case by claiming in her Petition that she opposed discrimination against women in the Athletic Department. However, when asked in her deposition to explain a statement in an interrogatory response that she had been removed as head women's basketball coach for opposing Respondent's discrimination against her and the women in the Athletic Department because of their sex, she testified that she was referring to discrimination by Respondent against the women's athletic programs, including male coaches of those programs, and **not** to discrimination against only women students and women coaches at the University.

Petitioner has claimed that she was terminated because she opposed alleged violations of Title IX at the University. Such a claim does not establish a retaliation claim under Title VII, because Title VII prohibits retaliatory conduct by an employer "because [an employee] has opposed any practice made an unlawful employment practice by this subchapter [*i.e.*, Title VII]. . . ." 42 U.S.C. § 2000e-3(a). Title VII does not prohibit an employer from retaliating against an employee for opposing practices made unlawful by other federal statutes (*i.e.*, statutes other than Title VII). *See Crowley v. Prince George's County*, 890 F.2d 683 (4th Cir. 1989) (Title VII did not prohibit retaliation against employee because he opposed racial harassment against members of the community that did not constitute employment discrimination); *Barber v. CSX Distrib. Serv.*, 68 F.3d 694, 701-02 (3d Cir. 1995) (employee's claim that he suffered retaliation due to a general complaint of unfair treatment did not state a retaliation claim under the Age Discrimination in Employment Act).

In short, the practices of which Petitioner complained were not discriminatory under Title VII, because they did not involve discrimination against employees of Respondent on the basis of their gender. According to Petitioner, she was terminated for complaining about disparities between the men's and women's athletic programs, rather than about intentional discrimination against employees of Respondent because of their sex.

CONCLUSION

Petitioner has attempted, in her Petition to this Court, to obscure the issues that were before the court below. The court below determined, based upon the factual record before it, and specifically upon Petitioner's own statements in the record, that Petitioner had failed to state a prima facie claim under Title VII either for sex discrimination or for retaliation. Accordingly, for all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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